IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 28

JAMES EDMUND GROPPI,
Appellant,

v.

STATE OF WISCONSIN,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF WISCONSIN

BRIEF FOR APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 26

JAMES EDMUND GROPPI,
Appellant,

v.

STATE OF WISCONSIN,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF WISCONSIN

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

1. Does the record herein present a factual context sufficiently concrete to enable this Court to determine whether §956.03(3) WIS. STATS. (1967) actually operated to impair this defendant's right to trial by an impartial jury?

2. Could Wisconsin in 1968 limit the availability of the change of venue device to felony cases without violating the right of misdemeanor defendants to trial by an impartial jury?

SUMMARY OF ARGUMENT

I.A. Defendant, who claims denial of his rights under the Sixth and Fourteenth Amendments, has failed to bring to this Court a record which will adequately show that application of §956.03(3) of the Wisconsin Statutes, which limits changes of venue for community prejudice to felony cases, impaired his right to an impartial jury.

Defendant's affidavit, claiming adverse pretrial publicity, is of no evidentiary value; there is no other evidence of community prejudice in this record. No continuance was requested on grounds of prejudice, and defense counsel made no effort to include proceedings on *voir dire* in the record. A jury was impaneled on the first morning of trial.

Since the record fails to show prejudice, it cannot be *presumed* that there was a probability of jury prejudice, and a determination of the constitutionality of the statute would be an advisory opinion, which this Court will not give.

B. A state may deny a change of venue for community prejudice in cases of less serious crimes without impairing defendant's rights to an impartial jury where, as in Wisconsin, the devices of *voir dire* and continuance are available and post-trial motions may be employed to remedy actual or probable prejudice.

Limitation of the change of venue device to felony cases has not been uncommon in this country. The questionable efficacy of the device, and the expense, delay and possible abuse involved in its exercise warrant its denial in misdemeanor cases, when other remedial devices are available.

II. Regardless of the intricacies of the formula used to distinguish felonies from misdemeanors in Wisconsin, those convicted of crimes determined to be felonies are subjected

to more rigorous penalties than those convicted of misdemeanor. The difference in consequences justifies granting additional procedural safeguards to persons accused of felony.

ARGUMENT

I. DENIAL OF THE MOTION FOR A CHANGE OF VENUE WAS NOT A DENIAL OF DUE PROCESS.

A. It Cannot Be Said, On This Record, That Defendant Was Even Probably Denied An Impartial Jury.

Defendant was convicted for misdemeanor in Milwaukee County Circuit Court on February 9, 1968, following a trial to a jury of twelve which commenced the previous day.[1]

This conviction arose out of his arrest on August 31, 1967, on a charge of "Resisting an Officer,"[2] a misdemeanor punishable by a fine of not more than $500 or imprisonment in the county jail for not more than one year, or both.[3]

At the time of trial,[4] a Wisconsin statute authorized changes of venue for community prejudice in felony cases.

/[1]The jury was impaneled and sworn before the noon recess on Feb. 8, 1968. The state opened its case at 2 p.m. on February 8, and rested the same day. On February 9, the defense presented its case, the state offered rebuttal testimony, and the case was argued and submitted to the jury at 1:15 p.m. The jury returned to court with its verdict at 4:55 p.m. on February 9, 1968. (A. 13, 14, 15)

/[2]§946.41 (1) WIS. STATS. (1967):

> "Whoever knowingly resists or obstructs an officer while such officer is doing any act in his official capacity and with lawful authority, may be fined not more than $500 or imprisoned not more than one year in county jail or both."

/[3]"Resisting an Officer" is a misdemeanor, since the county jail is expressly designated as the place of imprisonment upon conviction. §939.60, WIS. STATS. (1967) provides:

> "A crime punishable by imprisonment in the state prison is a felony. Every other crime is a misdemeanor."

/[4]§971.22, WIS. STATS., effective July 1, 1970, permits a change of venue in all criminal cases. See Chap. 255, Laws of 1969.

As construed by the state courts,[5] the statute *limited* changes of venue for that cause to felony cases, resulting in the denial of defendant's motion for a change of venue in his misdemeanor case.

In order to achieve a reasonably accurate perspective in evaluating this case by Sixth and Fourteenth Amendment standards, some pertinent aspects of Wisconsin criminal procedure should be noted:

—Wisconsin guaranteed trial by a jury of twelve to all persons accused of crime, whether felony or misdemeanor.[6]

—Wisconsin granted to all defendants an absolute right to a change of judge upon the defendant's affidavit that the judge originally designated was prejudiced.[7]

—Wisconsin required a preliminary examination for persons accused of felony, and a finding of probable cause as a prerequisite to the filing of an information.[8]

/[5]Rulings of the state courts are reproduced in the Appendix, 8-9, 207.

/[6]WIS. CONST. Art I, §7; §957.01 WIS. STATS. (1967)

/[7]§956.03 (1) WIS. STATS. (1967). Contrary to the claims in appellant's brief (see pp. 25, 27, 36), this statute provides for a change of judge only on grounds of personal interest or "the prejudice of the judge." The change of judge is permitted in jury trials as well as trials to the court. Community prejudice is not grounds for a change of judge under this section, which provides:

> "PREJUDICE OF JUDGE; ANOTHER JUDGE CALLED. If the presiding judge has acted as attorney for a defendant or for the state in the pending action, or if a defendant moves, in the manner provided in civil actions, for a change of venue on account of the prejudice of the judge, another judge shall be called in the manner provided in civil actions to try the action, except that in county courts containing 3 or more branches the case shall be referred to the clerk who shall in accordance with the rules of said court assign the case to another branch of that court for trial or other proceedings.***"

/[8]§955.18 WIS. STATS. (1967).

—By statute, unfettered participation in *voir dire* examination of prospective jurors was guaranteed to all parties.[9]

—Four peremptory challenges were allowed defendants in all criminal trials; twelve peremptory challenges were allowed in cases exposing the defendant to a sentence of life imprisonment.[10]

—Persons accused of misdemeanor were permitted to waive their right to be present at trial; those accused of felony were not.[11]

—Community prejudice was recognized as sufficient cause for the granting of continuances.[12]

In this procedural setting, defendant was obliged to proceed to trial in Milwaukee County following the denial of his motion for a change of venue. Facing trial by a jury selected from this allegedly hostile community, he had at his disposal a number of procedural alternatives to the change of venue which had been denied. The record does not reveal whether these alternatives were utilized:

1. Although the minutes and docket entries in the lower state courts show that defendant's trial date was continued six times,[13] there is nothing in the record to suggest that defense counsel at any time sought a continuance on the ground

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[9]§270.16 WIS. STATS. (1967).

[10]§957.03 WIS. STATS. (1967).

[11]§957.07 WIS. STATS. (1967).

[12]*State v. Woodington* (1966), 31 Wis. 2d 151, 166, 142 N.W. 2d 810, 817.

[13]Docket entries A. 1, 10, 11, 12.

of prejudicial pretrial publicity or community hostility. While the effectiveness of a continuance may be open to considerable doubt,[14] it is nevertheless significant that defense counsel made no attempt to employ a device traditionally considered as an alternative to a change of venue. If there was present in defendant's case any circumstance rendering continuance totally ineffective to reduce the hazard of an inflamed and prejudiced jury, it is not to be found in this record.

2. The record is entirely devoid of the type of evidence commonly relied upon to show the temper of a community allegedly permeated with prejudice against a defendant: the proceedings on *voir dire*.[15] The record reveals only that a jury of twelve plus one alternate was impaneled and sworn prior to the noon recess on the first day of trial, and that both the prosecution and the defense exercised all of their peremptory challenges.[16] The proceedings on *voir dire* are not reported in the record, and the record reveals no motion or request by counsel that they be reported.[17]

/[14]Note. *Impartial Jury - Twentieth Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial*, 51 CORNELL L. Q. 306, 314-315 (1966).

/[15]Note. *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME LAWYER 925, 936 (1967):

> "To the contrary, it may be argued that the courts' view of removal is the valid one since the *voir dire* examination affords an excellent opportunity to sound out community sentiment."

/[16]In Wisconsin, peremptory challenges are exercised following *voir dire* examination, the parties alternately striking names from a list of jurors not excused for cause until only twelve remain. §957.04, WIS. STATS. (1967). The lists herein are at A. 30, 44.

/[17]*Voir dire* examinations "need not be reported unless ordered by the court." §256.55 (3), WIS. STATS. (1967).

As a consequence, this court has no way of determining whether any prospective juror was challenged or excused for cause; — or whether any juror had formed any opinions of the defendant or of his guilt or innocence; — or whether any juror had been exposed to allegedly prejudicial sources of information. Thus it is impossible to know, from this record, whether the *voir dire* provided any evidence whatever of conditions rendering suspect the impartiality of the jurors who sat in judgment; indeed, there is nothing in the record to show that defense counsel even *attempted* to examine prospective jurors on *voir dire*. All that can be said, on this record, is that there was apparently no serious difficulty encountered in impaneling a jury.[18]

The compelling evidence of prejudice found by this Court in *Irvin v. Dowd*,[19] *Rideau v. Louisiana*,[20] *Estes v. Texas*,[21] and *Sheppard v. Maxwell*[22] is, therefore, absent from this record. It is not helpful, moreover, to take as true the averments of the motion for change of venue and its supporting affidavit,[23] since they contain only subjective evaluations of the publicity given to the defendant and his activities. The affidavit filed in support of the motion for a change of venue provides little, if any, factual support for a conclusion

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/[18]See note 1.

/[19]366 U. S. 717 (1961).

/[20]373 U. S. 723 (1963).

/[21]381 U. S. 532 (1965).

/[22]384 U. S. 333 (1966).

/[23]A. 23a-25a.

that the jury panel was even *probably* prejudiced. It alleges only that defendant was a well-known civil rights leader, that his activities had received "massive and frequently adverse" publicity, and that "some" of the news media had published "editorial criticisms" of his activities. There is no allegation whatever of distortion of fact or other prejudicial reporting of — or commentary on — the event out of which the misdemeanor charge arose.

If evidence of community prejudice existed, defense counsel could have supplied it for this record. There was nothing to prevent the incorporation of allegedly prejudicial media reports in the affidavit. There was likewise nothing to prevent defendant from introducing such evidence in support of a motion for continuance or, following the verdict, in support of a motion for new trial on grounds of "inherent" or "probable" prejudice.[24] Furthermore, there was nothing which prevented counsel from requesting that the proceedings on *voir dire* be reported for the record.

Defendant does not and cannot claim that this record shows that the twelve jurors who found him guilty were demonstrably prejudiced. He cannot even claim, on this record, that the jurors — or the panel from which they were selected — had previously been exposed to inflammatory or inaccurate of otherwise prejudicial publicity.

The unsatisfactory state of the record with respect to community hostility makes it impossible for any reviewing court to say, as this Court said in *Rideau v. Louisiana*,[25]

/[24]"Appellant contends that because his motion for a change of venue was denied, he had no opportunity to make a record of the community prejudice. This is simply not true. ***" (Opinion below, A. 213).

/[25]373 U. S. 723 (1963).

that "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."[26]

Nevertheless, this Court is asked to declare that defendant's conviction cannot stand: *not* because defendant had a Constitutional right to a change of venue in this case, but because his application for that change was denied without hearing, by the application of a statute which limited the availability of this device to those charged with felony.

The Court is therefore called upon by defendant to decide — in the abstract — whether persons charged with misdemeanor *could*, under a hypothetical set of facts evidencing a high degree of community prejudice, be Constitutionally entitled to a change of venue — even though alternative procedural devices designed to dilute or screen out prejudice are available. What is sought is an advisory opinion. This Court will not render advisory opinions;[27] this should be particularly true where, as here, "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims

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[26] Id. at 726.

[27] *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947):

> "***For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions,' are requisite."

such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."[28]

B. The Change of Venue Device Was Not Essential to Due Process in this Misdemeanor Prosecution.

No defendant is guaranteed an impartial jury in the philosophical sense.[29] Neither Wisconsin's Constitution nor the Constitution of the United States require the impossible; nor do they require that government do everything humanly possible to attain the closest possible approximation of the philosophical ideal. We tolerate acknowledged weaknesses and imperfections in the jury system when those imperfections do not outweigh the social cost of correcting them, or when a suspected imperfection seems slight in comparison with the real detriment suffered through use of a remedial device of doubtful efficacy.

The jury is itself a safeguard. Its impartiality is in turn safeguarded by procedures employed in its selection: the selection of the array is prescribed intricately, and is open to inspection and challenge; the selection of a panel from the array is accomplished by lottery, and the members of the

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[28]*Adams v. United States ex rel. McCann*, 317 U. S. 269, 281 (1942). Under circumstances not present in this record, the party claiming injustice is relieved of this burden. *Sheppard v. Maxwell*, 384 U. S. 333, 351-352 (1966).

Note, 33 FORD L. REV. 498 (1965), wherein the author points out that the *habeas* petitioner in *Mason v. Pamplin*, 232 F. Supp. 539 (W.D. Texas 1964) (*aff'd. sub.nom. Pamplin v. Mason*, 364 F. 2d 1 (5 Cir. 1966), having defaulted in placing evidence of prejudice on the record, failed to show that he had been sufficiently aggrieved by a Texas statute similar to Wisconsin's §956.03(3) to test its constitutionality. The author concludes (at 506-507) that the question of the constitutionality of the Texas statute was not properly before the court, and should not have been decided.

[29]Note, *supra* n. 14, 51 CORNELL L. Q. 306 at 307 (1966).

panel so chosen may be questioned in detail about individual circumstances that may affect their ability to perform their prescribed function. It is not enough that the prospective jurors disclaim prejudice under oath on *voir dire;* all are required to swear that they will perform their duty without partiality. Commonly, the protections erected against possible imperfections in juries are increased in proportion to the degree of punishment sought to be imposed upon the defendant: the number of allowable peremptory challenges may be increased;[30] the jury may be sequestered;[31] and a change of venue or of venire may be provided for in addition to continuance and *voir dire* examination.

While the criminal court jury as an institution is highly regarded as an important deterrent to oppression by government, it may be dispensed with entirely in some cases, for reasons of "efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive noninjury adjudications."[32] And while no state may deny a jury where government seeks to imprison a defendant for longer than six months, a jury composed of fewer than twelve jurors will satisfy federal Constitutional standards.[33]

Defendant now seeks a declaration by this Court that a change of venue, as a method of avoiding community prejudice, is a requirement of the Sixth Amendment as made applicable to the states by the Fourteenth Amendment, and that it is as

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[30]Note, *Community Hostility and the Right to an Impartial Jury,* 60 COLUM. L. REV. 349, 359, footnote 56 (1960).

[31]Note, *supra* n. 14, 51 CORNELL LAW Q. 306, 316 (1966).

[32]*Duncan v. Louisiana,* 391 U.S. 145, 160 (1968).

[33]*Williams v. Florida,* 38 U.S.L.WK. 4557, 26 L. ed. 2d 446 (1970).

fundamental a right as trial by jury, speedy trial, confrontation of prosecution witnesses and assistance of counsel. Further, he seeks an interpretation of those Amendments which would declare unconstitutional the past judgment of the state of Wisconsin that the availability of *voir dire* examinations, continuances, peremptory challenges and post-trial motions sufficiently protected persons accused of misdemeanors from occasions of community prejudice.

Defendant's brief maintains in support of its argument that change of venue is "fundamental to the American scheme of justice" that Wisconsin's statutory limitation of change of venue to felony cases is "almost without precedent."[34] The word "almost" covers a lot of territory.

The brief of appellant concedes, first of all, that states have felt themselves free to establish statutory standards for — and limitations upon — the change of venue device. Note 41 at pp. 31-32 of the brief demonstrates not only substantial variations in state change of venue practice, but also that a number of states, like Wisconsin, have in the past limited the change of venue device to felony cases.[35] In recent years, the trend among the states has been to extend the availability of the device to non-felony cases:[36] Since 1966

/[34]Appellant's brief, p. 30.

/[35]Note, 33 FORD L. REV. 498, 507 (1965); footnote 51 lists eight states which by statute limited change of venue to more serious crimes.
Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME LAWYER 925, 927-929 (1967).

/[36]Id. at 928.

Wisconsin, Vermont, South Dakota and Texas have altered their criminal procedures to permit a change of venue in non-felony prosecutions.[37] This trend hardly demonstrates, however, that Wisconsin's former practice in 1968 was "almost without precedent."

Further illustration of the fact that limitations on the availability of the change of venue device are not without precedent may be found in federal practice where, until the advent of Federal Rule of Criminal Procedure 21 in March, 1946, the device was simply not available to any defendant.[38]

While change of venue for local prejudice in misdemeanor cases has been a traditional procedural avenue in many jurisdictions, a significant number of jurisdictions have felt that the right to fair trial by an impartial jury could be protected without it. Given other procedural safeguards, the availability of change of venue was not considered the point of demarcation between fair trial and unfair trial.

The procedural devices employed for the purpose of avoiding possible jury prejudice include change of venue, change

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[37] §971.22, WIS. STATS. (eff. 7/1/70 - Ch. 255, Laws of 1969); VT. STATS. ANN. Tit. 13, §4631 (1969); S.D. COMP. LAWS. §23-28-7 (1967); TEX. CODE. CR. PR. ANN. Art. 31.01 (1966).

[38] Medalie, *Federal Rules of Criminal Procedure*, 4 LAWYERS GUILD R. (3) 1, 5 (1944):

> "It has long been recognized by many states that a defendant may have his cause removed to another county upon proof of prejudice existing in the locality in which he would otherwise be tried. Curiously, no such right has been recognized by the federal courts."

Cummings, "The Third Great Adventure," 29 ABAJ 654, 655-656 (1943):

> "Lawyers not thoroughly familiar with federal practice are somewhat astounded to learn that they may not move for a change of venue, even if they are able to demonstrate that public feeling in the vicinity of the crime may render impossible a fair and impartial trial. This seems to be a defect in the federal law, which the proposed rules would cure."

See also: Cipes, MOORE'S FEDERAL PRACTICE, 2d (1969), §§. 21.01(1), 21.02, 21.03.

of venire, continuance and *voir dire*. The oath-giving is likewise apparently considered an effective safeguard, as are the Court's instructions to disregard out-of-court sources of information and conscious bias or prejudice.[39] In a sense all of these devices are "palliatives," since they are designed to avoid or dilute pre-existing prejudice; prior control of media treatment of the cause, through whatever means are available, effective and necessary, may *prevent* the formation of some forms of prejudice.[40] Once trial has begun, cautionary instructions, sequestration of the jury, control of court officers and the media, and protection of witnesses are devices available to guard against undesirable intrusions into the fact-finding process.

The relative effectiveness of each device heretofore thought to enhance the jury's impartiality, and the relative advantages and disadvantages which each carries with it,[41] are not subject to objective appraisal. Certainly it is true that the efficacy of *voir dire* may be questioned;[42] but the same may be said of a change of venue from one county to another — at least in the latter half of the twentieth century. Continuances are at once a service and a disservice to both sides in many cases.

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[39]Note, *supra* n. 35, 42 NOTRE DAME LAWYER 925, 926-927 (1967); Note, *The Impartial Jury*, 51 CORNELL L. Q. 306, 313-317 (1966); Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 356-370 (1960).

[40]Id. at 370-375.

[41]Id. at 356-375.

[42]Broeder, *Voir Dire Examinations: An Empirical Study*, 38 SO. CAL. L. REV. 503 (1965). Broeder's study of *voir dire* examinations which were "perfunctory, stilted affairs" is not, however, a valid evaluation of the effectiveness of such examinations when properly conducted.

The effectiveness of many devices heretofore believed to enhance jury impartiality is open to honest and serious debate. What is considered a fundamental right in one state may be regarded as totally unnecessary to fair trial in another; what is regarded as administratively cumbersome or too costly in one time may be thought acceptable and desirable in another.

The present state of our knowledge about the efficacy and necessity of any one of the devices thought to be effective to combat jury prejudice is limited, as is our ability to effectively appraise the social cost of the availability and extensive use of each such device. It may well be, for example, that attitude inventories employed by psychologists would be a far more effective tool for screening out prejudice than any of the methods heretofore employed — change of venue not excepted.

There is room within the jury trial framework for considerable latitude and variations in the methods adopted by the states to enhance impartiality while at the same time protecting the state's right to impose sanctions on offenders in a reasonably efficient manner. There was room, within that framework, for Wisconsin to determine that the expense, delay, possibilities of abuse and questionable efficacy of change of venue[43] were acceptable social costs in felony cases, where

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[43] *Note, supra* n. 35, 42 NOTRE DAME LAWYER 925 (1967) at p. 942:

> "Removal is capable of working an extreme dislocation in the administration of criminal justice. It is expensive and generally inconvenient, and it has excellent potential as a dilatory tactic. Further, it amounts to an admission that justice cannot be done in the forum in which the motion is made, which is a severe blow to people who pride themselves in their ability to be fair to their fellows. Finally, removal runs counter to the tradition that the administration of criminal law is primarily the concern of the community in which the crime is committed."

the stakes were high, but not acceptable in misdemeanor cases, where the stakes were lower both in terms of length of sentence and collateral consequences of conviction. In Wisconsin, at the time of defendant's trial, denial of change of venue in misdemeanor cases cannot be said to have denied defendant a "fair trial in a fair tribunal."

This Court has said that

> " '[D]ue process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. * * * Whether the Constitution requires that a particular right obtain in specific proceedings depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding are all considerations which must be taken into account."[44]

Within the boundaries marked by "specific factual contexts," states have been declared "free to enforce their criminal laws under statutory provisions and common law doctrines as they deem appropriate * * *."[45]

Among the procedural details said to be left to the judgment of the several states are those surrounding the rules for the selection of juries. In *United States v. Wood,* 299 U.S. 123, 145-146, (1936), this Court said:

> "In Stilson v. United States, 250 U.S. 583, 586, 40 S. Ct. 28, 29, 30, 63 L.Ed. 1154, we said on this point: 'There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury

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/[44]*Hannah v. Larche,* 363 U.S. 420, 442 (1960)

/[45]*Buchalter v. New York,* 319 U.S. 427, 430 (1943)

> is all that is secured. The number of challenges is left to be regulated by the common law or the enactments of Congress.' And the same was held to be true of the authority of Congress to treat several defendants, for this purpose, as one party. It is not necessary to multiply illustrations of the familiar principle which while safeguarding the essence of the constitutional requirements permits readjustments of procedure consistent with their spirit and purpose.
>
> Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. State courts enforcing similar requirements of state constitutions as to trial by jury have held that legislatures enjoy a reasonable freedom in establishing qualifications for jury service although these involve a departure from common law rules."

Justice Frankfurter wrote in 1946 that the Due Process Clause had not created a "uniform code of criminal procedure" for the states.[46] This Court has affirmed, in *Williams v. Florida*,[47] that the states remain free to establish criminal procedures that do not render utterly sterile the fundamental substantive rights guaranteed by the national Constitution.

Section 956.03(3) of the Wisconsin Statutes did not deny Father Groppi an impartial jury. If his jury was prejudiced against him, the prejudice does not appear in this record as a reality, or even a probability.

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[46] *Carter v. Illinois*, 329 U.S. 173, 175 (1946)

[47] 38 U.S.L.WK. 4557, 26 L. ed. 2d 446 (1970)

II. CONVICTION OF FELONY IN WISCONSIN CARRIES MORE SERIOUS CONSEQUENCES THAN CONVICTION FOR MISDEMEANOR; THE STATE DOES NOT WITHHOLD EQUAL PROTECTION OF THE LAWS WHEN IT PROVIDES ADDITIONAL SAFEGUARDS IN FELONY CASES.

A person convicted of a felony in Wisconsin faces the possibility of imprisonment for more than one year.[48] This class of crime is without exception punishable by imprisonment in the state prison.[49] The convicted defendant is disfranchised,[50] and the conviction carries a considerable social stigma. More severe enhancement of punishment under the repeater statute is authorized for felons than for misdemeanants.[51]

In contrast, a misdemeanor conviction in Wisconsin exposes the defendant to a maximum of a year's incarceration; collateral consequences such as disfranchisement and stigma do not follow or are less severe, and invocation of the repeater principle at a subsequent time carries less risk than that to which a "felony repeater" is exposed.

Accompanying the risk of more serious consequences of conviction of felony are the additional procedural safeguards afforded a felony defendant in Wisconsin: the preliminary (probable cause) hearing[52] and availability of the change of

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/[48]§§ 939.60, 959.044, WIS. STATS. (1967)

/[49]Id.

/[50]WIS. CONST. Art. III, §2

/[51]§939.62 WIS. STATS. (1967)

/[52]§955.18 WIS. STATS. (1967)

venue device.[53] When the felony involved is punishable by life imprisonment, a further safeguard is provided: the number of allowable peremptory challenges is increased to twelve.[54]

While resort to several statutes and some Wisconsin case law[55] is sometimes necessary to fully understand the classification of misdemeanors and felonies in Wisconsin, only one relevant principle need be extracted for the purpose of judging differentiation in procedural treatment between the two classes of crime: that which is ultimately determined to be a felony carries significantly greater risks for the accused as far as punishment and collateral consequences are concerned. Once a crime is classified as either misdemeanor or felony under Wisconsin rules, the difference in consequences upon conviction fully justifies differences in procedural treatment.

Former sec. 956.03 (3), affording a change of venue to felony defendants only, was not a legislative declaration that community prejudice could not exist against one accused of misdemeanor. It was, rather, a recognition of the need for *additional* protection against such prejudice in cases involving the possibility of more severe penalty. In addition, then, to the remedial devices of continuance and *voir dire* examination, which were available in misdemeanor cases, Wisconsin added the change of venue device at the point that the hazard of severe penalty was significantly increased.

Baldwin v. New York[56] did not outlaw the classification of crimes as misdemeanors and felonies, nor did it proscribe

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[53] §956.03 (3) WIS. STATS. (1967)

[54] §957.03 WIS. STATS. (1967)

[55] *State ex rel. Gaynon v. Krueger*, 31 Wis. 2d 609, 143 N.W. 2d 437 (1966); *Pruitt v. State*, 16 Wis. 2d 169, 114 N.W. 2d 148 (1962)

[56] 38 U.S.L.WK. 4554, 26 L. ed. 2d 437 (1970)

differences in procedures to be observed in the prosecution of these classifications. *Baldwin* held only that the Sixth Amendment right to jury trial, as applied to the states, attached when "the possible penalty exceeds six months' imprisonment," — an implicit recognition of the Constitutional validity of differentiation in procedure between prosecutions for "serious" and "less serious" offenses.

The Wisconsin Supreme Court, recognizing that it had previously ruled that assigned counsel must be provided for indigent defendants threatened with imprisonment exceeding six months, nevertheless recognized that the legislature might validly provide, as it had, for a different "cutoff point" at which the right to change of venue would attach. While the Wisconsin court expressed a preference for the "six-month cutoff," it correctly recognized that the felony-misdemeanor "cutoff" was within permissible limits of legislative discretion.[57]

Change of venue is not the "fundamental right" that this court dealt with in *Baldwin v. New York*. It is thought to be, under some circumstances, an aid to the achievement of the imperfect practical model of the "impartial jury" guaranteed by state and federal constitutions. Limiting its availability to those charged with felonies is not a denial of equal protection of the laws. The Fourteenth Amendment is not to be construed "as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment."[58]

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[57] A.211.

[58] *Graham v. West Virginia*, 224 U.S. 616, 630 (1912)

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

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